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No. 98-567

Supreme Court, U.S.
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In The

Supreme Court of The United States

October Term, 1998

NORMAN GABAY,

Petitioner,

- v -

MOSTAZAFAN FOUNDATION OF IRAN and
MOSTAZAFAN FOUNDATION OF NEW YORK,
a/k/a THE ALAVI FOUNDATION,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION OF RESPONDENT ALAVI FOUNDATION SUED HEREIN AS THE MOSTAZAFAN FOUNDATION OF NEW YORK

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20 pp

QUESTION PRESENTED

Did the courts below misapply the day-to-day control test enunciated by this Court in First National City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611 (1983), as required by the immunity exception of the Foreign Sovereign Immunities Act, 28 U.S.C. §1605(a)(3) to determine the question of a foreign entity's alleged control of a New York not-for-profit corporation?

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STATEMENT OF THE CASE

This lawsuit is the third proceeding that petitioner has initiated regarding property he alleges was expropriated in Iran. Each of petitioner's claims in those prior proceedings were dismissed. Petitioner's first claim was brought under a pseudonym in the United States District Court for the Central District of California: *Bernard G. Martin, a pseudonym v. Government of Iran, et al,* 81 Civ. 6501 (RJK) (N.D. Cal.) (hereinafter "California Complaint"). Petitioner's California Complaint, which was dismissed without prejudice in February 1982, alleges that the Iranian government seized control and possession of his property. No mention of the Alavi Foundation is made in petitioner's California lawsuit.

On January 19, 1982, petitioner initiated his second proceeding, an arbitration claim in the United States-Iran Claims Tribunal ("Claims Tribunal") in the Hague,[1] alleging that the Iranian Government and the Mostazafan Foundation of Iran allegedly expropriated his property. *Gabay v. Iran,* Award No. 515-771-2, 27 Iran-U.S.C.T.R. 40, 41 (July 10, 1991). No mention of the Alavi Foundation is made in petitioner's arbitration claim.

While petitioner asserted before the Claims Tribunal that his property was taken in 1980 and submitted papers to support this claim, these documents were found to be forgeries because the dates had been altered. Accordingly,

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[1] In February 1981, President Ronald Reagan ordered the suspension of litigation in United States courts against the Iranian Government for claims arising before January 19, 1981. 31 C.F.R. § 535.222. An arbitral body, the Claims Tribunal, was established to decide claims of American citizens against Iran. The jurisdiction of the Claims Tribunal only extended to claims arising on or before January 19, 1981.

the Claims Tribunal dismissed petitioner's claim for lack of jurisdiction.

Petitioner's third proceeding is the matter currently before this Court. On September 22, 1992 petitioner sued the Mostazafan Foundation of Iran and the Alavi Foundation alleging that between 1981 and 1983 the Mostazafan Foundation of Iran expropriated petitioner's property in Iran. Petitioner claimed jurisdiction pursuant to 28 U.S.C. § 1330 and the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S,C. §§ 1605(a)(2) and 1605(a)(3). As was the case in his two prior proceedings, petitioner was represented by counsel (Baker & McKenzie) throughout the proceeding in the district court below. In lieu of answering, both the Alavi Foundation and the Mostazafan Foundation of Iran moved to dismiss.

Considering only the issue of subject matter jurisdiction Judge Wood ruled on October 15, 1993 that petitioner was unable to show subject matter jurisdiction under 28 U.S.C. § *1605(a)(2)*. *Gabay v. Mostazafan Foundation of Iran, et al, 151* F.R.D. 250, 255 n.8 (S.D.N.Y. 1993). Petitioner was permitted, however, to conduct discovery on the issue of "whether the [Mostazafan Foundation of Iran] exercised control over the day-to-day activities of the [Alavi Foundation"] sufficient to satisfy the requirements of 28 U.S.C. § 1605(a)(3). *Gabay,* 151 F.R.D. at 257.

Three years later, after petitioner had taken seven depositions and after the Alavi Foundation produced more than 15,000 documents, respondents renewed their substantive motions. The Alavi Foundation moved for summary judgment based on lack of subject matter jurisdiction, failure to state a prima facie case, and statute of limitations grounds. The Mostazafan Foundation of Iran

moved pursuant to Fed. R. Civ. P. 12(b)(1) and (2), or in the alternative, for summary judgment based on lack of subject matter and personal jurisdiction and the statute of limitations.

On June 5, 1997, Judge Stein, to whom this case was reassigned, granted respondents' motions based on petitioner's failure to establish subject matter jurisdiction. Judgment was entered on June 6, 1997 and petitioner's notice of appeal to the United States Court of Appeals for the Second Circuit was filed on July 2, 1997. Petitioner's counsel moved to be relieved as soon as the notice of appeal was filed.

On May 5, 1998, the United States Court of Appeals for the Second Circuit (Graafeiland, Meskill, Cabranes, JJ per curiam) affirmed the District Court decisions by summary order because petitioner failed to offer sufficient evidence to overcome the presumption of independence between respondents Mostazafan Foundation of Iran and the Alavi Foundation as required by *First Nat'l City Bank v Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611 (1983) ("*Bancec*")

On July 30, 1998, Justice Ruth Bader Ginsberg granted petitioner's application for an extension of time in which to file his petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

Because petitioner failed to assert any of the established bases for granting certiorari, this Court should deny his writ. One, petitioner has failed to assert that the decision of the Court of Appeals involves an area of conflict among the circuit courts. Two, similarly, petitioner has failed to assert that the Court of Appeals misapplied Supreme Court precedent on an important federal question, or that the Court of Appeals decided an important question of federal law that has not been, but should be, settled by this Supreme Court. Three, petitioner has failed to assert that the Court of Appeals acted in any way as to require the exercise of this Court's supervisory power. Fairly stated, petitioner seeks review in this Court to overturn *Bancec* even though no conflicts or misinterpretations of this fifteen-year old precedent exist. According to petitioner, reversal of *Bancec* is required because given the facts here, he cannot meet the minimum standards articulated in *Bancec* for subject matter jurisdiction under 28 U.S.C. § 1605(a)(3).

Petitioner's basis for subject matter jurisdiction under 28 U.S.C. § 1605(a)(3) rested on the allegation that the Mostazafan Foundation of Iran, which he claimed expropriated his property, was the same entity as the Alavi Foundation, a New York not-for-profit corporation. Looking to applicable laws, especially *Bancec,* the lower courts required petitioner to show the exercise of "day-to-day" control by the Mostazafan Foundation of Iran over the Alavi Foundation. After petitioner wholly failed to present evidence on this issue, the lower courts properly ruled that they lacked subject matter jurisdiction over petitioner's expropriation claim.

The courts below, following *Bancec* and its progeny: (i) applied the correct legal standard for evaluating the

alleged alter ego status of the Alavi Foundation; and (ii) properly recognized that petitioner had the burden of overcoming the presumption of independence. As one of the courts below stated, this Court in *Bancec* "suggested two situations in which the presumption of separateness might be overcome: (i) when 'a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created; and (2) when recognizing separateness of the agency or instrumentality would work a fraud or injustice.'" *Gabay*, 151 F.R.D. at 253, Reasoning that the presumption of separateness in this case would work a fraud or injustice only if the Alavi Foundation is "an illusory corporate fiction, which plaintiff has yet to establish," *id.* at 254, the courts below rightly held that only the first test applied here. Having failed to overcome the presumption of independence after extensive discovery, petitioner now wants this Court to abandon established precedents and find, based solely on petitioner's unsupported allegations, that the presumption of independence and the application of the day-to-day control test will lead to injustice. Such assertions are insufficient grounds for granting petitioner's writ.

The rulings below that petitioner failed to demonstrate the Mostazafan Foundation of Iran's control over the day-to-day activities of the Alavi Foundation are well-supported by the evidence. Petitioner is incorrect when he asserts that there was no dispute over the current ownership of his property because uncontroverted evidence shows that petitioner's property was confiscated by the Iranian judiciary and was given to an entity that has no ties to the Mostazafan Foundation of Iran, let alone the Alavi Foundation. Thus, jurisdiction over the Alavi Foundation also was lacking because the relevant section of the FSIA, which permits certain suits based on the expropriation of property, only applies if that property "is owned or operated by an agency or instrumentality of the foreign state and that agency or

instrumentality is engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3) (emphasis supplied).

I. THE DECISIONS BELOW DO NOT RAISE AN IMPORTANT ISSUE THAT CALLS FOR THIS COURT'S REVIEW.

The precedents upon which the decisions below turn are well-settled and present no area of conflict among the circuit courts. Nor does a question of federal law exist as a result of this case that has not been previously settled by this Court. In *Bancec*, this Court, adhering to the language of the FSIA and following precedent arising in similar corporate setting, accorded a presumption of independence to instrumentalities of a foreign state that only can be overcome if the instrumentality is so extensively controlled by its owner that a relationship of principal and agent is created or if to maintain the presumption would work fraud or injustice. 462 U.S. at 628. As in this case, this presumption is the more vital when the alleged agent, and the entity on which petitioner presumably seeks to impose liability, is organized under the laws of a state of the United States.

Petitioner not only failed to satisfy either of the *Bancec* criteria with regard to the Alavi Foundation in the courts below, but petitioner fails to identify for this Court any decisions that are inconsistent with the lower courts' application of *Bancec* to analogous factual circumstances. Similarly, petitioner's claim that the lower courts misapplied Supreme Court precedent is not substantiated by other decisions that demonstrate differing applications to similar factual circumstances. Petitioner simply has relied on unsupported conclusory arguments of "injustice" and asks this Court to overturn *Bancec* regarding which no conflict or ambiguity exists.

II. THE LOWER COURTS CORRECTLY APPLIED THE DAY-TO-DAY CONTROL TEST FOR OVERCOMING THE PRESUMPTION OF INDEPENDENCE BETWEEN GOVERNMENT INSTRUMENTALITIES UNDER *BANCEC.*

Liberally construed, petitioner asserts two justifications for review by this Court: (1) by applying the day-to-day control test, the lower courts misapplied *Bancec* to the specific facts of this case; (2) by not finding fraud or injustice, the lower courts did not give proper weight to petitioner's evidence. Petitioner is wrong on both grounds.

1. *Bancec,* As Applied By The Lower Courts, Governs This Case.

(a) An Agent-Principal Standard Must Include a Day-to-Day Control Test

In the courts below, petitioner sought to satisfy the jurisdictional requirement of 28 U.S.C. § 1605(a)(3) -- that the accused foreign state's agency or instrumentality is engaged in commercial activity in the United States -- by claiming that the Mostazafan Foundation of Iran and the Alavi Foundation are the same entity and have an agent-principal relationship.

The courts below correctly looked to *Bancec* for guidance on the standard for exercising jurisdiction over a foreign state's instrumentality. Petitioner's theory always has been that the Alavi Foundation is an alter-ego of the Mostazafan Foundation of Iran. *Gabay*, 151 F.R.D. at 254. Following *Bancec,* the district court presumed that the Alavi Foundation is a separate entity, *see Bancec,* 462 U.S. at 626-27; *Foremost-McKesson v. The Islamic Republic of Iran,* 905

F.2d 438, 440 (D.C. Cir. 1990); *De Letelier v. Republic of Chile*, 748 F.2d 790, 795 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985), and held that the Alavi Foundation's status as a separate and distinct entity could not be ignored absent a showing that the Mostazafan Foundation of Iran exercised day-to-day control over the Alavi Foundation. Petitioner conducted intensive jurisdictional discovery on the question of "day-to-day control" mandated by *Bancec* and after failing to adduce any evidence to support his theory, petitioner now disputes the standard and claims that discovery below was guided by the wrong interpretation of *Bancec*. (Petitioner's Brief at 9-12).

The agent-principal standard articulated by *Bancec*, and applied by most courts through a day-to-day control test, is necessary to satisfy the jurisdictional requirement of 28 U.S.C. § 1605(a)(3). The test serves to ensure that to obtain jurisdiction over a foreign state allegedly involved in the expropriation of a plaintiff s property, that "property must be owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3). Petitioner's artificial distinction between the purposes of the "expropriation exception" and those of the "commercial activities exception" under the FSIA is a red herring. The standards applied by the lower courts in this case have been used by other courts under the expropriation exception of FSIA. See, e.g. *Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia*, 616 F. Supp. 660, 666 (W.D. Mich. 1985).

Courts interpreting *Bancec* have consistently applied a day-to-day control test to determine the independence of a foreign state instrumentality under the FSIA. *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 351-52 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1045 (1996)

(jurisdiction found when foreign government exercised day-to-day control because it appointed six of seven corporate directors); *Hester Int'l Corp. v. Federal Rep. of Nigeria*, 879 F.2d 170 (5th Cir. 1989); *Minpeco, S.A. v. Hunt*, 686 F. Supp. 427,428 (S.D.N.Y. 1988) (day-to-day control over instrumentality's operations is more significant than broader control such as appointing directors and officers); *Baglab Ltd. v. Johnson Malthey Bankers Ltd.*, 665 F. Supp. 289 (S.D.N.Y. 1987) (no jurisdiction when foreign state bank ceased to exercise day-to-day control by replacing and restructuring the management of the alleged alter ego); *Kalamazoo*, 616 F. Supp. at 665 (jurisdiction and immediate control found when foreign government required all checks in excess of $25,000 be signed by government appointee). As these cases demonstrate, to meet the jurisdictional requirement of the 28 U.S.C. § 1605(a)(3), a day-to-day control test, as used by the courts below, must be applied to the foreign government and its alleged instrumentality.

Without any factual support, petitioner argues that this Court should abandon the presumption that incorporated entities are separate from each other or the requirement that a plaintiff making a claim under the FSIA prove, at a minimum, some sort of nexus between the foreign state and its alleged instrumentality. (Petitioner's Brief at 13-14.) Petitioner further argues that this Court should abandon these standards and impute to the Alavi Foundation the activities and control of the Mostazafan Foundation of Iran. (Petitioner's Brief at 20.) The courts below correctly rejected these arguments and this Court should do the same because case law has repeatedly recognized the presumption of separateness following *Bancec*, whether or not a foreign government is not directly involved in the claim. *See, e.g., Federal Ins. Co, v. Richard I. Rubin & Co., et al.*, 12 F.3d 1270, 1286-87 (3d Cir. 1993), *cert. denied sub nom. E jay Travel, Inc, v. Algemeen Burgerlijk Pensioenfonds*, 511 U.S.

1107 (1994) (applying *Bancec* to determine relationship between instrumentality and its subsidiaries).

Given the importance which Congress attached to the immunity of government instrumentalities, the FSIA should be interpreted literally and should not be misconstrued as petitioner suggests in his petition. See *Bancec*, 462 U.S. at 627-28; *Jet Line Services, Inc. v. M/V Marsa El Hariga et al.*, 462 F. Supp. 1165, 1170 (D. Md. 1978) (FSIA codified the restrictive theory of sovereign immunity both in terms of its general application as well as all relevant exceptions). The FSIA clearly extends immunity to instrumentalities by including them in the definition of foreign states. 28 U.S.C. § 1603(a),(b). Moreover, as this Court has observed, "[s]eparate legal personality has been described as 'an almost indispensable aspect of the public corporation'." *Bancec*, 462 U.S. at 625. Indeed, "[f]reely ignoring the separate status of government instrumentalities would result in substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign [the alleged alter ego], and might thereby cause third parties to hesitate before extending credit to a government instrumentality without the government's [the alleged alter ego's] guarantee." *Id.* at 626. Congress' concern to protect an instrumentality's ability to conduct its own affairs is equally strong, probably more so, under the facts of this case when the evidence has shown no links between the two foundations.

b) Recognizing Separateness of the Agency or Instrumentality from the Foreign State Does Not Work a Fraud or Injustice.

Throughout his brief, petitioner insists on embracing *Bancec's* discussion of injustice yet he presents no basis to abandon *Bancec* and its requirement of day-to-day control. Petitioners claim of injustice was correctly rejected below,

Gabay, 151 F.R.D. at 254 n.5, because there was no injustice in regarding the Mostazafan Foundation of Iran and Alavi Foundations as separate unless the foundations were alter egos. This is precisely what this Court said in *Bancec*. *Bancec*, 462 U.S. at 628. Petitioner attempts to skip the necessary legal step of establishing an alter ego relationship and baldly states that there should be no presumption of separateness because somehow a serious injustice is being perpetrated if such presumption is upheld.

Petitioner has no proof that the Mostazafan Foundation of Iran is covertly taking advantage of the American legal system through the Alavi Foundation. Indeed, such unfounded allegations, made without legal or factual support were insufficient to win reversal of the judgment entered below, and should not be entertained by this Court. The universally accepted teaching of *Bancec* is that, in dealing with the issue of an alleged alter-ego for purposes of exercising jurisdiction over a foreign government's instrumentality, the rule is a presumption of separateness and this rule may be overcome, in certain circumstances, by the fraud or injustice exception. This Court's cautionary note, referred to in petitioner's writ, articulates this very teaching. To overcome the obvious weakness in his case, however, petitioner suggests that this Court expand the scope of the exception so much so that the exception swallows the rule.

The undisputed fact remains that after three years of discovery petitioner was unable to produce any evidence showing that the two foundations are linked in any way. Petitioner was unable to substantiate his allegations of injustice precisely because no control exists between the two foundations.

2. Petitioner's Evidence Does Not Demonstrate That the Mostazafan Foundation of Iran Exercises Any Control over the Alavi Foundation

Petitioner has failed both to meet the well-settled standards enunciated in *Bancec,* or to raise an alternative legal standard that he can convincingly satisfy. Petitioner's assertions in his writ as well as in his appeal below amount to speculation and conjecture insufficient to defeat summary judgment. The evidence established through the discovery process is undisputed:

(i) The Alavi Foundation is a not-for-profit corporation registered pursuant to New York State law and has no owner. The Alavi Foundation's main purposes, among others listed in its certificate of incorporation, are to render voluntary support by means of grants and contributions to exempt organizations that benefit the aged, sick and indigent; to establish scholarships, fellowships, prizes and research awards to support the study and promotion of the arts and; to contribute to religious instructions regardless of creed in order to promote understanding and harmony among persons of all faiths;

(ii) The property of the Alavi Foundation is managed by the foundation and is used in accordance with its certificate of incorporation and by-laws. The Alavi Foundation had no involvement with the alleged expropriation of petitioner's property;

(iii) The Alavi Foundation's directors are duly and correctly elected by the foundation's own board according to New York State law;

(iv) The minutes of the Alavi Foundation's August 27, 1979 meeting that are attached to petitioner's brief were

prepared by lawyers at Rogers & Wells. Former Secretary of State William P. Rogers was a member of the Alavi Foundation's board through August 1979. As he confirmed in his deposition, Mr. Rogers resigned from the Alavi Foundation's board when it became important for the board to meet on a more regular basis. Petitioner's inference that the Mostazafan Foundation of Iran somehow controlled Mr. Rogers' decision is not only unreasonable, but truly preposterous;

(v) There is no evidence of any direct or indirect influence or control, much less the required "day-to-day control." The Mostazafan Foundation of Iran has never been present at any of the Alavi Foundation's directors meetings. The business activities of the Alavi Foundation have been conducted by its own directors. The evidence and deposition testimony established that none of the officers and directors of the Alavi Foundation are agents, officials, officers or employees of the Mostazafan Foundation of Iran. No one on the Alavi Foundation's board is authorized to vote on behalf of the Mostazafan Foundation of Iran;

(vi) The Alavi Foundation is financially independent of the Mostazafan Foundation of Iran. The Alavi Foundation is not undercapitalized and petitioner recognized in the court below that funding for the Alavi Foundation's activities comes from the rental income it receives from the interest it owns in a commercial office building. The Alavi Foundation has been responsible for its own debts and the Mostazafan Foundation of Iran has not guaranteed the Alavi Foundation's debts nor provided any funds to the Alavi Foundation;

(vii) The Alavi Foundation is not a sham corporation. The Alavi Foundation hires its own employees; its employees are not bound by the same rules and

regulations that the Mostazafan Foundation of Iran imposes on its employees. The Alavi Foundation maintains its own separate bank accounts and prepares its own tax, accounting and financial information. The Alavi Foundation and the Mostazafan Foundation of Iran do not share office space.

In the face of this uncontrovertible evidence, petitioner seeks to escape the *Bancec* day-to-day control standard rather than satisfy it. The weaknesses of petitioner's case, however, are not grounds for this Court to accept his petition of certiorari.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
November 2,1998

Respectfully submitted,
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